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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 SOUTH HILL MARKET, a Washington
8 entity; GEDION TEKLEMARIAM
TESFA, an individual and OGBAI
9 GEBREMICHAEL TESFU, an
individual,

10 Plaintiffs,

11 vs.

12 UNITED STATES; and U.S.
DEPARTMENT OF AGRICULTURE
13 (USDA),

14 Defendants.

No. 2:19-cv-00073-SMJ

DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' EXHIBIT LIST AND
WITNESS LIST (ECF No. 43)

15 Defendant United States of America, by and through its counsel of record,
16 William D. Hyslop, United States Attorney for the Eastern District of Washington,
17 and the undersigned Assistant United States Attorneys, pursuant to the Court's
18 Scheduling Order (ECF No. 19), hereby submits its objections to Plaintiff's Exhibit
19 List and Witness List (ECF No. 43).

20 **I. INTRODUCTION**

21 Many of the exhibits submitted by Plaintiffs are irrelevant to the Food and
22 Nutrition Services (FNS) finding that South Hill Market (South Hill) trafficked SNAP
23 benefits based on a review period of November 2017 through March 2018. Fed. R.
24 Evid. 401, 402. Even if the Court determines exhibits have questionable relevance, the
25 probative value is often outweighed by exhibits that are confusing, misleading, or
26 needlessly cumulative. Fed. R. Evid. 403. Numerous exhibits also contain hearsay
27 with no applicable exception. Fed. R. Evid. 802. For these reasons and reasons set
28

1 forth in further detail below, Defendants specifically object to Plaintiffs' exhibits: 3;
2 4; 5; 6; 7; 8; 9; 10; and 11.

3 Defendants' object to Plaintiffs witness list to the extent numerous listed
4 witnesses appear to be needlessly cumulative.

5 **II. PROCEDURAL BACKGROUND**

6 Plaintiffs Gedion Tesfa and Ogbai Tesfu own South Hill Market, a convenience
7 store which was authorized to participate in SNAP in 2015. In 2017, USDA's FNS
8 detected patterns of SNAP redemption consistent with trafficking at South Hill—
9 specifically, 309 unusually large and unusually frequent transactions. FNS then
10 conducted an onsite investigation and further analysis of the store's transaction data,
11 ultimately concluding that there was no justification for the suspicious transactions and it
12 was more likely than not that the store was trafficking SNAP benefits. During the
13 investigative process, FNS also learned that South Hill's SNAP redemptions exceeded its
14 total eligible inventory for three months of the review period. After an administrative
15 review process, FNS issued a Final Agency Decision upholding the agency's decision to
16 permanently disqualify South Hill from SNAP because Plaintiffs had failed to justify the
17 unusually large and frequent transactions.

18 Under the Food and Nutrition Act and the SNAP regulations, "FNS shall . . .
19 [d]isqualify a firm permanently if . . . personnel of the firm have trafficked as defined in
20 § 271.2." 7 C.F.R. § 278.6(e)(1)(i); 7 U.S.C. § 2021(b)(3)(B). Trafficking includes "[t]he
21 buying, selling, stealing, or otherwise effecting an exchange of SNAP benefits issued and
22 accessed via [EBT] cards, card numbers and [PINs], or by manual voucher and signature,
23 for cash or consideration other than eligible food, either directly, indirectly, in complicity
24 or collusion with others, or acting alone." 7 C. F.R. § 271.2(1). FNS may base its
25 decision to disqualify an authorized retailer on evidence including "facts established
26 through on-site investigations, inconsistent redemption data, evidence obtained through a
27 transaction report under an [EBT] system, or the disqualification of a firm from the
28 Special Supplemental Nutrition Program for Women, Infants and Children" *Id.* at
DEFENDANTS' OBJECTIONS TO EXHIBIT AND WITNESS LIST - 2

§ 278.6(a).

Plaintiffs filed their complaint against the United States on March 7, 2019, seeking review of FNS' decision. ECF No. 1. The United States filed its motion for summary judgment on May 22, 2020. ECF No. 26. In their response on June 12, 2020, Plaintiffs included the above referenced documents as exhibits. *See* ECF Nos. 28-2 – 28-9. Plaintiffs now seek to introduce these same documents into evidence at trial. ECF No. 43.

III. ARGUMENT

The exhibits Plaintiffs seek to introduce are attempts to reinforce the same general conclusory theories they have relied on throughout the case. They are not probative of the 309 transactions identified by FNS during the review period (November 2017 to March 2018) indicative of trafficking. In fact, none of the exhibits address the transactions in question. This Court should reject these exhibits because they are irrelevant and excluded by the Federal Rules of Evidence.

A. FNS Charge Numbers (Exhibit 3)

Plaintiffs submit a one page document purporting to show FNS charge numbers for 2016, 2017, and 2018. The documents are irrelevant to the underlying issue in this case – can Plaintiffs prove by a preponderance of evidence they did not traffic in SNAP benefits based on an FNS review from November 2017 – November 2018. Fed. R. Evid. 401, 402. What FNS may have done in other SNAP cases is irrelevant to that question. *Id.* In fact, the only purpose for the Exhibit 3 is to show FNS acted in conformance with these other charging decisions, which is character evidence specifically excluded under Fed. R. Evid. 404.

Even if the evidence is deemed relevant, and is somehow not excluded under Fed. R. Evid. 404, the probative value is substantially outweighed by the confusing and misleading nature of the exhibit. Plaintiffs used the same document in response to Defendants' Motion for Summary Judgment. *See* ECF No. 28, p. 2; ECF No. 28-2. It is anticipated they will use it the same way at trial – to extrapolate percentages to imply FNS acted in conformance to the numbers listed. ECF Np. 28, p.2. Plaintiffs' use of the

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1 numbers is misleading – FNS can send a charge letter toward the end of one calendar
2 year, but not issue a final decision until the following year. Therefore, just because a
3 charge letter was issued in 2016, for example, does not mean a determination letter was
4 issued the same year. Any conclusion to that effect is misleading or confusing, and
5 should not be considered. Fed. R. Evid. 403.

6 **B. Customer Affidavits (Exhibit 4)**

7 The customer affidavits contained in Plaintiffs’ Exhibit 4 are irrelevant and
8 inadmissible hearsay. The affidavits are irrelevant because they are purportedly executed
9 more than a year after FNS’ investigation of South Hill. One affidavit is undated, and the
10 others are signed in October/November 2019. The review period in this case was from
11 November 2017 – March 2018, with a store visit on April 2018. Affidavits signed more
12 than a year after the fact can have little bearing on this case, especially since the
13 affidavits do not even clarify when the customers allegedly shopped at South Hill or what
14 they *may* have purchased. They are nothing more than generalized, conclusory
15 statements. *See Cheema v. United States*, 365 F. Supp. 3d 172, 183-84 (D. Mass. 2019)
16 (customer affidavits are too generalized to effectively refute the USDA’s data); *Famous*
17 *Int’s Mkt. v. United States*, 2018 WL 3015249, at *11 (E.D. Pa. June 15, 2018) (“the
18 customers do not refute or provide detail on specific purchases at issue and do not
19 provide detail corroborating the Market’s belief customers made repetitive transactions
20 because [of] the Market’s store hours.”); *Duchimaza v. United States*, 211 F. Supp. 3d
21 421 (D. Conn. 2016) (“Plaintiffs’ assertion that members of the same family would visit
22 the store on the same day is simply a conclusion; Plaintiffs cite no examples, provide not
23 data and do not even attempt to account for the specific transactions the FNS
24 identified....”) The affidavits are irrelevant and inadmissible under Fed. R. Evid. 402.

25 More importantly, the affidavits are hearsay excluded by Fed. R. Evid. 802. All of
26 the affidavits contain out of court statements offered to prove the truth of the matter
27 asserted – e.g. several customers *may* have bought more than \$100 worth of items from
28 South Hill at some undefined time. Fed. R. Evid. 801; ECF No. 28-3. There is no
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1 applicable exception to the hearsay rule under either Fed. R. Evid. 803 or 804, and none
2 of the declarants are listed as witnesses at trial. The affidavits must be excluded.

3 **C. Pictures of Teff Flour (Exhibit 5)**

4 Defendants' objection to Exhibit 5 is under Fed. R. Evid. 403. The pictures are
5 unnecessarily cumulative, and it makes more sense to use the exact same pictures in the
6 Administrative Record at AR 687 – 690. ECF No. 15 at AR 687-690.

7 **D. HistoryLink.org Article, "Ethiopian and Eritrean Communities in
Seattle" (Exhibit 6)**

8 Plaintiffs seek to introduce an article discussing the Ethiopian and Eritrean
9 communities in Seattle. This is not relevant as to whether South Hill, a convenience store
10 in Spokane, trafficked SNAP benefits. Fed R. Evid. 401. Accordingly, it is inadmissible.
11 Fed R. Evid. 402. The exhibit is also confusing/misleading because it relates to Seattle
12 not Spokane. Fed. R. Evid. 403.

13 Additionally, the article is hearsay and is not admissible. Fed. R. Evid. 802. "It is
14 axiomatic to state that newspaper articles are by their very nature hearsay evidence and
15 are thus inadmissible if offered to prove the truth of the matter asserted[.]" *AFMS LLC v.*
16 *UPS Co.*, 105 F. Supp. 3d 1061, 1070 (C.D. Cal. 2015) (quoting *In re Dual-Deck Video*
17 *Cassette Recorder Antitrust Litig.*, No. MDL 765, 1990 U.S. Dist. LEXIS 19207, 1990
18 WL 126500, at *3 (D. Ariz. July 25, 1990)). Plaintiffs offer the article to prove the
19 content of the story: that there is a large Ethiopian and Eritrean community in Seattle
20 (presumably inferring Washington in general). Accordingly, it is inadmissible hearsay.
21 Fed R. Evid. 801(c).

22 **E. June – September 2018 Receipts of alleged EBT Transactions at
23 South Hill Market (Exhibit 7)**

24 Plaintiffs introduce register receipts spanning June 5, 2018 through September 3,
25 2018. Again, these receipts are irrelevant: they are outside the review period and do not
26 address any of the 309 suspicious transactions FNS identified in its charge letter. Fed R.
27 Evid. 401, 402. The receipts all date from after Plaintiffs had been informed of the
28 trafficking charge against them, and are not indicative of their sales before they knew

1 they were being investigated for trafficking. The receipts are irrelevant as to whether
2 South Hill was trafficking SNAP benefits during the review period and are not
3 admissible. Fed. R. Evid. 402. It should also be noted the receipts were first disclosed in
4 June 2020 (past the discovery cut-off) in response to Defendants Motion for Summary
5 Judgment, and after Plaintiffs repeatedly testified they could not produce such
6 documents. Because Plaintiffs have consistently testified they cannot produce evidence of
7 what customers purchased, the original receipts should be required under Fed. R. Evid.
8 1002, 1003. Genuine questions exist about the original exhibits authenticity.

9 **F. Invoices Billed to South Hill Market (Exhibit 8)**

10 In support of their assertion that teff flour sales explain the suspiciously large
11 transactions, Plaintiffs have included numerous alleged invoices from their supplier.
12 These invoices are irrelevant and inadmissible. Fed R. Evid. 402. Relevance is the
13 tendency to make a fact of consequence more or less probable. Fed. R. Evid. 401.
14 “Relevancy is not an inherent characteristic of any item of evidence, but exists only as a
15 relation between an item of evidence and a matter properly provable in the case.”
16 *Huddleston v. United States*, 485 U.S. 681, 689 (1988) (quoting Advisory Committee’s
17 Notes on Fed. R. Evid. 401, 28 U.S.C. App., p. 688). These invoices, however, add
18 nothing new to the question of whether the suspicious transactions during the review
19 period were legitimate. Not only are most of the invoices from outside the review period,
20 they include invoices from before Plaintiffs even owned the store. Additionally, the only
21 invoices that *are* from the review period were previously provided to FNS and are part of
22 the record. ECF No. 13-1 at AR 223; ECF No. 14 at 457; ECF No. 15 at 663. Duplicate
23 evidence will not make it “more or less probable” that the transactions were legitimate.
24 Fed R. Evid. 401(a), Fed. R. Evid. 403.

25 The invoices are also inadmissible hearsay. They are written statements made out
26 of court and offered for the truth of the matter asserted – that is, that South Hill purchased
27 teff flour. *See Advanced Reimbursement Solutions LLC v. Spring Excellence Surgical*
28 *Hosp.*, 2020 WL 587841, *4 (D. Ariz. February 5, 2020) (invoices are inadmissible
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1 hearsay unless exception applies); *see also ID Security Systems Canada, Inc. v*
 2 *Checkpoint Systems, Inc.*, 249 F. Supp. 2d 622, 683 (E.D. Penn. 2013) (invoices
 3 inadmissible hearsay in absence of testimony from employee knowledgeable about
 4 invoice generation during relevant time period.) Thus, for the invoices to be admissible
 5 South Hill must show that an exception to the hearsay rule applies. *In re Oracle Corp.*
 6 *Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) (the party seeking admission ... bears the
 7 burden of proof to show its admissibility).

8 The only relevant exception to the hearsay rule is Fed. R. Evid. 803(6) – the
 9 business records exception. The rule “allows the admission of business records when two
 10 foundational facts are proved: (1) the writing is made or transmitted by a person with
 11 knowledge at or near the time of the incident recorded, and (2) the record is kept in the
 12 course of regularly conducted business activity.” *Sea-Land Serv., Inc. v. Lozen Int’l,*
 13 *LLC.*, 285 F.3d 808, 819 (9th Cir. 2002). Proper foundation requires an employee
 14 knowledgeable about invoice generation during the relevant time period. *ID Security*
 15 *System*, 249 F. Supp. 2d at 683. Here, there is no witness to testify about the invoice
 16 generation. ECF No. 43 (Plaintiffs’ witness list does not include anyone from the Teff
 17 Flour Company). The invoices are therefore, inadmissible hearsay. They do not have any
 18 other indicia of reliability because many of them look different, they contain different
 19 information, and many lack any indication they are actually from the supplier Teff Flour
 20 Company. *See* ECF No. 15 at AR 792-94.

21 **G. June 2, 2014 Money.com Article, “Your Grocery Store May Soon Be**
 22 **Cut in Half” (Exhibit 9)**

23 Plaintiffs seek to introduce an article describing the increased popularity of smaller
 24 grocery stores. Again, this is irrelevant because it does not bear on any fact of
 25 consequence in this case. Fed. R. Evid. 401. As discussed below, the size of South Hill is
 26 not a factor in determining whether Plaintiffs trafficked SNAP benefits—nor is South
 27 Hill the size of stores like Trader Joe’s and ALDI. Accordingly, the article is not
 28 admissible. Fed. R. Evid. 402. The article is also misleading and confusing because South

1 Hill is not a grocery store – it is a gas station. Fed. R. Evid. 403.

2 Like the above article about Seattle, this article is offered to prove the truth of its
3 contents and is thus inadmissible hearsay. Fed. R. Evid. 801(c), 802.

4 **H. South Hill Market Property Size Chart (Exhibit 10)**

5 Plaintiffs seek to introduce the property information report from the Spokane
6 County Assessor for the parcel on which South Hill is located. The report lists the
7 property as a “multi-tenant strip [mall]” with a single building onsite measuring 21,152
8 square feet. This report does not indicate South Hill itself is 21,152 square feet; rather,
9 the building in which South Hill and its neighboring businesses are located is 21,152
10 square feet in total. The property report says nothing about the size of South Hill.

11 Further, the store’s size is not probative of any fact of consequence in this action.
12 See Fed. R. Evid. 401(b). Store size is not a factor FNS considers in determining whether
13 it is more likely than not that trafficking has occurred. Thus, information tending to
14 indicate something about South Hill’s size is not relevant and should be excluded. Fed R.
15 Evid. 402.

16 Even if it were probative evidence, the assessor’s information should be excluded
17 under Fed. R. Evid. 403 because any relevance is substantially outweighed by the
18 confusion and waste of time the evidence would create. Relevant evidence may be
19 excluded “if its probative value is substantially outweighed by a danger of one or more of
20 the following: unfair prejudice, confusing the issues, misleading the jury, undue delay,
21 wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. Here,
22 any evidence about South Hill’s size will first require resolution of the discrepancies in
23 its reported size. Plaintiffs have variously described the store as 21,000 square feet or
24 10,000 square feet. *See* ECF No. 13-1 at AR 100; ECF No. 15 at AR 832; ECF No. 29-3,
25 Tesfa Dep. p. 34:18–24. The FNS contractor’s visits approximated the store’s size as
26 5,200 square feet in 2018. ECF No. 13-1 at AR 50. Despite these discrepancies, however,
27 the size of the store is not relevant as to whether the suspicious transactions were
28 legitimate. ECF No. 35, Rivas Dep. p 15:8–11. The side issue or “mini trial” is
DEFENDANTS’ OBJECTIONS TO EXHIBIT AND WITNESS LIST - 8

1 accordingly a waste of time that needlessly confuses the real issue in this case: whether
 2 Plaintiffs trafficked SNAP benefits. *See Tennison v. Circus Circus Enters., Inc.*, 244 F.3d
 3 684, 690 (9th Cir. 2001) (affirming district court that excluded disputed evidence because
 4 allowing such evidence would be an inefficient allocation of trial time as it will create
 5 “mini trials”).

6 The exhibit is also not properly authenticated under Fed. R. Evid. 901, 902(1)-(2).
 7 Since Plaintiffs are also using the exhibit to prove the truth of the matter asserted – that
 8 somehow South Hill Market takes up the entire 21,000 square foot building – the exhibit
 9 is hearsay without a proper witness to provide necessary foundation testimony to fall
 10 under an exception. Fed. R. Evid. 802, 803.

11 **I. Letter from Dangachew Uma (Exhibit 11)**

12 Similar to the Customer Affidavits above (Exhibit 4), Plaintiffs’ Exhibit 11 is
 13 irrelevant and inadmissible hearsay. Fed. R. Evid. 402, 802. The letter does not
 14 discuss any time frame regarding the sale of teff flour, and it is dated over two years
 15 after the FNS review. The letter does not tend to prove one way or the other whether
 16 South Hill trafficked in SNAP benefits. In addition, the letter is hearsay under Fed. R.
 17 Evid. 801 and 802. The exhibit should be excluded from evidence.

18 **J. Witnesses**

19 Plaintiffs provide a list of 9 witnesses expected to testify at trial. Witnesses 1
 20 through 5 are all listed as “current or former employee[s] of South Hill Market and
 21 [are] expected to testify to the sale of EBT eligible items, and other store policies
 22 regarding SNAP benefits.” ECF No. 43. The expected testimony appears needlessly
 23 cumulative, and should be limited under Fed. R. Evid. 403 to the extent each
 24 witnesses does not provide different/new testimony. Defendants also reserve the right
 25 to object to all the other listed witnesses pursuant to Fed. R. Evid. 402.

26 **IV. CONCLUSION**

27 This Court should exclude the above documents from evidence at trial. They are
 28 irrelevant and inadmissible evidence under Federal Rules of Evidence 401, 402, 403,
 DEFENDANTS’ OBJECTIONS TO EXHIBIT AND WITNESS LIST - 9

1 801, 802, 901, 902, 1002, and 1003. This Court should also limit witnesses that are
2 needlessly cumulative.

3
4 RESPECTFULLY SUBMITTED: July 10, 2020.

5 William D. Hyslop
6 United States Attorney

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10 Attorneys for Defendant United States
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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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And to the following non CM/ECF participants: N/A

s/Derek T. Taylor
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